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CRUCIAL ISSUES IN LABOR LITIGATION.

II.

HITHERTO we have been considering the *primâ facie* liability of a single individual, not acting in concert with others.

How as to the *primâ facie* liability of defendants who are members of a combination?

Of course, wherever a single defendant would be *primâ facie* liable, members of a combination should be equally so.

The dispute is as to whether the members of a combination incur a greater *primâ facie* liability than a single individual. If an independent individual intentionally bringing about a certain result by a certain method is not liable, are members of a combination intentionally accomplishing the same result by the same method liable? Upon this question opinions differ. There is a dispute as to the interpretation and effect of certain decisions.¹ There is also a controversy as to the result in case the question is considered solely upon principle. All that is proposed here is: first, to give briefly some of the leading arguments which have been brought forward in discussing the matter upon principle; and then, secondly, to call attention to certain practical considerations, growing out of modern changes, which seem decisive.

If the foregoing question is answered in the affirmative, it must be on the ground that a combination, *quâ* combination, necessarily involves some feature or features intrinsically objectionable.

¹ See Mr. Cohen's "Memorandum on the Civil Action of Conspiracy," concurred in by three of his colleagues. Report of the Royal Commission on Trade Disputes, etc., 20-23; also Report, art. 61, p. 15. A majority of the Commission answer the question in the negative. Cf. 22 L. Quar. Rev. 117, and Pollock, Torts, 7 ed., 318.

There is, we think, only one feature common to all efficient combinations; namely, members agree to act (on certain subjects or within certain limits) according to the vote of a majority, or agree to obey the orders of some union official. Is this feature so objectionable as to impose upon members a civil liability for acts which would not be tortious if done by a single person acting independently?

We give Professor Dicey's statement of the question (in different phraseology), and his admirable summary of the difficulties in the way of a satisfactory solution: ¹

"How can the right of combined action be curtailed without depriving individual liberty of half its value; how can it be left unrestricted without destroying either the liberty of individual citizens or the power of the government?"

"May X, Y, and Z lawfully bind themselves by agreement to act together for every purpose which it would be lawful for X, Y, or Z to pursue if he were acting without concert with others?"

"If this question be answered in the affirmative, then contractual freedom, and therefore individual liberty of action, receives what appears to be a legitimate extension, but thereupon, from the very nature of things, two results immediately ensue. The free action of X, Y, and Z is, in virtue of the agreement into which they have entered, placed for the future under strict limits, and their concerted action may grievously interfere with the liberty of some third party, T. . . . A body . . . created by combination . . . by its mere existence limits the freedom of its members, and constantly tends to limit the freedom of outsiders."

"If, on the other hand, the question before us be answered in the negative, and, in the interest of individual freedom, the law forbids X, Y, and Z to combine for purposes which they might each lawfully pursue if acting without concert, then the contractual power of X, Y, and Z, or, in other words, their liberty of action, suffers a serious curtailment."²

The same questions and arguments may be presented in other forms.

The objection to a labor combination is twofold:

- (1) It tends to limit the liberty of the insiders (the members).
- (2) It tends to increase the probability of damage to outsiders; including non-union workmen, employers, and the general public.

As to the first objection. On the one side it is said: "Free-

¹ In quoting these detached passages, the order in the book has not been followed.

² Dicey, *Law and Public Opinion*, 466, 154, 153, 155.

dom of contract means freedom not to contract and freedom to agree with others not to contract."¹

To this it is answered: "Any one may exercise a choice as to whom he will sell his goods, but he cannot enter into a contract whereby he binds himself not to sell, for in such instance he barter away his right of choice, and destroys the very right he claims the privilege of exercising. After entering upon such agreement he is no longer a free agent."²

To this it is replied, that the argument carries too far; that it would prevent the organization of a partnership, a corporation, or a state. "It is an argument that would be pertinent against the organization of society into government. The will of the individual must consent to yield to the will of the majority, or no organization either of society into government, capital into combination, or labor into coalition, can ever be effected. The individual must yield in order that the many may receive a greater benefit."³

As to the second objection to a labor combination; namely, the probability of greater damage to outsiders.

On the one hand it is urged that what one man may do singly a number of men may lawfully do together; that what several men, each acting independently, may lawfully seek to accomplish, the same persons, acting in concert, may lawfully seek to accomplish.

In other words, "the element of combination to do an act does not make that act wrongful if the act, if done by one, would not be wrongful. . . ." ⁴ "Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do. . . ." ⁵

On the other hand it is said: "The force acquired by combination is incalculably greater than the sum of the powers so transferred to the union by each individual. . . ." In the words of Mr. Mitchell: "Six million trade unionists in the United States would not be twice, but four or five times as powerful as three millions."⁶ There is "multiplication of force by combining. . . ." ⁷

¹ The Nation, vol. 79, p. 47.

² Ellison, J., in *Ford Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 69. Of course the same argument would apply to a contract not to labor.

³ Adams, J., in *Wabash Ry. Co. v. Hannahan*, 121 Fed. Rep. 563, 571.

⁴ See 42 Am. L. Reg. (N. S.) 133, n. 19.

⁵ Lord Morris, in *Mogul, etc., Co. v. McGregor*, [1892] A. C. 25, 50. Cf. Judge Holmes, in 8 HARV. L. REV. 8.

⁶ Mitchell, *Organized Labor*, 407.

⁷ See Erle, *Trade Unions*, 2.

The increase of power by combination is "in geometrical proportion to the number concerned."¹ "... a grain of gunpowder is harmless, but a pound may be highly destructive. . . ."² A combination "is something more than the mere sum of individualities that compose it; . . . its power is something quite different from the mere aggregate of the powers of the parties to the combination. . . ."³

The commission of certain acts "by the concerted action of a number of persons materially alters their character, in this respect at least, that they thereby become more formidable, more oppressive, and more difficult to resist, and consequently more generally dangerous. . . ."⁴

It is possible that it will hereafter be more clearly seen "... that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind."⁵

It is not material to consider which of these conflicting views would have prevailed in the eighteenth century. At this day the foregoing arguments against labor combinations cannot be allowed controlling force. The changes in the modes of business, brought about by the inventions coming into common use in the nineteenth century, present practical considerations which are decisive in favor of sustaining the right of laborers to combine. The law, if it were formerly otherwise, must change with alterations in the circumstances of society.⁶ These alterations have been forcibly stated by Mr. Brooks Adams

"In the nineteenth century our society broke with its past by the introduction of steam. . . . I suppose within seventy-five years social condi-

¹ Gibson, C. J., in *Com. v. Carlisle*, Brightly N. P. (Pa.) 36, 41.

² Lord Brampton, in *Quinn v. Leatham*, [1901] A. C. 495, 530.

³ 1 Eddy, *Combinations*, § 475.

⁴ Andrews, J., in *Leatham v. Craig*, Ireland [1899] 2 Q. B. & Ex. D. 667, 676. And see Prof. Wyman, in 17 Green Bag 22, 23.

⁵ Hammond, J., in *Martell v. White*, 185 Mass. 255, 260. It would seem that legislation restraining or regulating the action of combinations is at least as likely to be held constitutional as legislation restricting the liberty or regulating the conduct of a single man. See Holmes, J., in *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 410; also in *Aikens v. Wisconsin*, 195 U. S. 194, 205.

⁶ See Erle, *Trade Unions*, 26, n. 1; 9, 38, 39, 47, 48, 49.

tions have changed more profoundly than they had done before since civilization emerged from barbarism, and apparently we are only at the beginning. . . . A new civilization has arisen, based on scientific discoveries and undreamed of mechanical processes, which, beside generating the trade union, develop the monopoly. . . . ”¹

Combinations of capital are now a necessity. Modern business, in many of its most important forms, cannot be carried on without them.²

A very large proportion of laborers are no longer employed singly, or in small groups, by individual masters. They are now working in large masses in the employ of persons representing aggregations of capital. If, then, capital can combine, labor must equally be allowed to combine. The inevitable tendency of both classes to combine can neither be ignored nor repressed by the courts. Judge Holmes has said: “. . . the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.”³ To permit combination to capital and deny it to labor, or *vice versa*, would result in revolution, and ought to so result.⁴ “. . . the law of capitalist combination cannot permanently remain different from that of labor combination.” “The law of combination, as laid down for capital, must end as affecting the law as laid down for labor, or *vice versa*. They cannot be kept in separate compartments.”⁵

It is plain that workmen, if each negotiates singly with a combination of capitalists, will not attain as favorable terms, either as to wages or hours, as could be obtained by collective bargaining on

¹ Centralization and the Law, 46, 47, 48.

² Aggregations of capital usually exist under the form of a corporation. Some technical lawyer may, perhaps, set up a claim that a corporation is, in the eye of the law, a single legal person, and hence cannot be regarded as a combination. But the fictitious legal entity is composed of natural persons, and the courts will go behind the legal entity and look at the natural persons wherever justice requires.

³ Holmes, J., in the dissenting opinion in *Vegeahn v. Guntner*, 167 Mass. 92, 108.

⁴ See dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 932, 933, 938, 939.

⁵ Prof. Ashley, in *Nat. Rev.* for March, 1906, pp. 65, 66. These sentences, though apparently written with special reference to the methods allowable to combinations, seem also applicable to the primary question of permitting the existence of combinations.

their part. Some of us are old enough to remember the days when no unions had been formed among the workmen in certain large industries owned by aggregations of capital; and we believe that the laborers did not then, in some respects, enjoy as favorable terms as they deserved.¹ Today, ". . . the mass of wage earners can no longer be dealt with by capital as so many isolated units. The time is passed when the individual workman is called upon to pit his single, feeble strength against the might of organized capital."²

Later on, under the head of "justification," the view will be advanced that a defendant is liable who, by temporal inducement, instigates an outsider (not a fellow craftsman, not an employer of the craft, and having no direct interest in the dispute) to take part in a labor conflict to the damage of the plaintiff. Why, it may be asked, does not this view necessarily imply the intrinsic unlawfulness of a combination? Must not each member of a combination be regarded as influencing his co-members to do whatever the combination does?³ We reply that there is a wide difference between thus inducing a neutral to take part in a conflict, and uniting (for purposes of conflict) with other persons having similar interests with the defendant and taking, after such union, only such action as any single man might lawfully have taken if acting independently. Granting that each member of a combination may be liable for persuading his fellow members to take action which is unlawful, *e. g.*, the breaking of a contract, yet this is entirely beside our present line of inquiry. We are now considering whether a combination is unlawful when it takes only such action as could lawfully have been taken by a single man not acting in concert

¹ This is not to be understood as implying that the employers of a former day were intentionally unfair to their workmen. Those employers were generally men of high character. But almost any man who has a practically absolute power to fix upon the terms of a business relation between himself and another person will unconsciously settle upon terms unduly favoring himself. It will not occur to him that any injustice is being done. He will be unable to put himself in the other man's place. This trait (or defect) in human nature will undoubtedly be illustrated at the present day by the terms which labor will assume to dictate to capital, whenever labor feels certain that capital has no choice but to submit. "This is the inevitable result of human infirmities from which laborers are no more exempt than capitalists." Prof. Bullock, 94 Atl. Monthly 437. Of all the maxims of the law there is none sounder than the one which says that no man ought to be judge in his own cause.

² Attorney-General Olney, as *amicus curiæ*, in *Platt v. R. R.*, 65 Fed. Rep. 660; quoted in 83 Fed. Rep., at 933.

³ See 17 Green Bag 27; 42 Atl. Rep. 107.

with others. And it will be remembered that we have maintained that merely persuading another to do what he had a lawful right to do, *e. g.*, to refrain from entering into a contract, is not actionable.

Our conclusion is that the intrinsic nature of a combination furnishes no reason for holding that its members incur a greater *prima facie* liability than a single individual.

The bill now¹ pending in the British Parliament seems based on a much wider proposition; namely, that a combination (of either workmen or employers) not only incurs no greater liability than a single individual, but also enjoys greater immunity than a single individual; in fact, constituting a privileged class not liable for the torts of its agents acting within the scope of their authority. It now seems assumed that the Trades Disputes Bill will be finally enacted in the form which passed the committee stage in the House of Commons. The material portion of clause 4 is thus stated in the *Law Times* of Aug. 11, 1906:

"An action against a trade union, whether of workmen or masters, or against any members or officials thereof, on behalf of themselves and all other members of the trade union, for the recovery of damages in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court . . ." ²

In the note below will be found some very pungent criticisms on this provision.³ Should such a statute be enacted in one of our states, its constitutionality would be vigorously questioned.

¹ December, 1906.

² It will be noticed that, as the clause then read, the immunity thus conferred was not even confined to acts done in the process of a trades dispute.

³ "As regards wrongful acts committed by Trade-Unions, all the laws of the realm, whether statute or common, are hereby repealed." Sir Edward Carson, quoted in *The Spectator* for Aug. 11, 1906.

"Two classes of citizens are deliberately placed above the law in respect to the main business of their lives. . . . Both men and masters, when combined in Unions, are given a charter of exemption as privileged banditti." *The Spectator*, Aug. 11, 1906.

"Clause 4, as we have said, passed [through Committee in the House of Lords] untouched, and trade unions are therefore free to commit any tortious act, which naturally will include defamation, fraud, and deceit, provided it is done for the furtherance of a trade dispute. Apparently the promoters of this measure considered, so far as these disputes are concerned, that any means will justify the end." *L. T.*, Dec. 15, 1906.

Lord James of Hereford, in the House of Lords, said that Parliament was giving trade unions the right to say: "We can take away a man's character, destroy his repu-

If a combination in its intrinsic nature is not objectionable, are labor combinations unlawful on account of aiming at monopoly; namely, monopoly of labor in a particular trade or trades?¹ That they do aim at monopoly does not seem questionable.² But monopoly is also the undoubted aim of various large combinations of capital.³ So long as the state does not suppress the capitalistic monopolies, it cannot suppress the labor monopolies without giving rise to a revolution, and so *vice versa*. At common law mercantile monopolies and labor monopolies must be on the same footing. Both must be held unlawful, or neither. They must stand or fall together. One will not be permanently suppressed unless the other is.

That capitalistic combinations will in the near future be suppressed for the sole reason that they aim at monopoly, we, for our own part, do not believe. They may and should be regulated; their doings may be brought into the light of publicity; they may be deprived of certain special privileges, they may be restrained from certain abuses, from unlawful methods of attaining their ends; but annihilation on the sole account of their tendency to create monopolies will not be their fate.

tation and living, and we have the right to do these things because we are a trade union." L. T., Dec. 15, 1906.

"If an employer who is not a member of a union has his plant destroyed through the action of a union, where will be his remedy?" L. T., Aug. 11, 1906.

"The bill in substance, conceal the matter as you will, legalizes boycotting for the benefit of unions, whether of men or of masters." Prof. A. V. Dicey, in "A Protest against Privilege," Nat. Rev. for Oct., 1906, p. 223.

"Passing now to the demand to protect the funds of trade unions against payment of damages for wrongs done by them or by their agents, it must be borne in mind that there is no difficulty whatever in doing this by declaring trusts of those funds and limiting their application to specified purposes. But this will not answer the purpose of the managers of the strikes. They want the control of the funds for promoting strikes and for compelling other persons to strike, and yet to protect those funds from the claims of persons injured by what is done in carrying out the orders of the trade unions. Anything more opposed to legal principles or good sense can scarcely be conceived. . . . The law of agency often produces hardships on employers, but that is no reason for altering it in favor of trade unions so as to produce greater injustice to others than it produces now to trade unions and other associations who carry on their operations by agents." Lord Lindley's letter in the London Times of Sept. 6, 1906; reprinted in the Boston Transcript of Sept. 22, 1906.

¹ "The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly." Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 359. Cf. 65 Atl. Rep. 169, 170.

² Prof. Bigelow has recently said that labor as well as capital "in combinations is in effect an agency in monopoly." *Centralization and the Law*, 8.

³ We are speaking here of combinations other than those known as public service companies, upon which the state bestows exclusive privileges in consideration of their obligation to render service to the public.

Whether the so-called "monopolies" of the present day are or are not objectionable, they certainly are very different from the monopolies of former times.¹ The old monopolies owed their success to governmental grants of exclusive privileges and were justly "odious." But many of the trade and labor monopolies of the present day do not owe their prosperity to the special favor of the government, but to the number and power of their members.² And it is open to other citizens to form rival combinations.³ "Monopoly" has ceased to mean that the government retains for itself, or sells to one person or company, the exclusive right to deal in a certain commodity or to carry on a certain kind of trading. The present so-called monopoly in trade or labor is frequently due to the enterprise of private individuals.

If we are right in supposing that mercantile monopolies will not be suppressed, then it is reasonably certain that labor monopolies will be permitted to exist.

If, on the other hand, all mercantile monopolies, in the broad modern sense, are to be overthrown, labor unions will have to share their fate; and so *vice versa*.⁴ But we do not think that at the present day combinations of either traders or laborers will be suppressed merely because they tend (or indeed aim) to create monopolies.

Thus far we have been considering the probable fate of modern monopolies at the hands of the modern common law. What will be the practical result of legislation designed to exterminate one class of monopolies and at the same time to permit the continued existence of the other class?

If the legislature should pass an act purporting in general terms to make monopolies unlawful, but expressly excepting labor monopolies, the act should, and probably would, be held unconstitutional. A similar result would follow in case a general statute expressly excepted mercantile monopolies from its operation.⁵ How if the legislature should single out certain specific kinds of mercantile monopolies and expressly prohibit them, carefully omitting all

¹ See 1 Eddy, Combinations, §§ 1, 29-35, 299-307.

² See 40 S. E. Rep. 593, *per* Brannan, J.

³ Some of the bitterest contests in labor cases have been waged between rival combinations of workmen; *e. g.*, *Allen v. Flood*, *Plant v. Woods*.

⁴ ". . . it is equally logical to condemn such tactics on the part of either trade-union or trust, . . ." Prof. Bullock, in 94 Atl. Monthly 436, 437.

⁵ See 2 Eddy, Combinations, §§ 909-912; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

mention of labor monopolies? Even if the act were held constitutional, the obvious inconsistency and unfairness of such legislation would prevent its efficient enforcement and it would soon become a dead letter. A similar result would follow if the legislature should specifically prohibit labor monopolies, and make no provision as to mercantile monopolies. In short, it is, practically speaking, as true of legislative action as of judicial action that mercantile monopolies and labor monopolies must be treated with equal impartiality. And it is highly improbable that a bill prohibiting *both* these kinds of monopolies would now be passed by any legislature.¹ Entertaining these views, we agree with Professor

¹ The above predictions relate to the probable action of courts and legislatures at the present moment, and are based on the assumption that most of the so-called fundamental principles of the common law are still in force, and that no essential changes will immediately be made in our written constitutions.

But it has been thought by some that the recent astounding changes in social conditions necessitate a corresponding change in the law; involving great alterations in our constitutions. It is possible to gather from the able essays of Mr. Brooks Adams, in "Centralization and the Law," that all existing legal principles must be discarded and an entirely new system evolved to meet the present emergencies. In his belief, two grim alternatives now confront us: on the one hand, despotism, either by capitalists or trade unionists; on the other hand, the establishment of state socialism (or at least state regulation of prices). See 19 HARV. L. REV. 395, 396.

Prof. Bullock, in his able article, "The Closed Shop" (94 Atl. Monthly 433, 438), speaking of the attempt of labor unions to control admission to trades and secure for themselves a monopoly of labor, says: "A little reflection should convince any one that the conditions under which a man shall dispose of his labor are of such exceeding importance to society that, if freedom is to be denied, the restrictions imposed should be determined by the government and not by any other agency. Such regulations should be just, uniform, and certain; they should not be subject to the possible caprice, selfishness, or special exigencies of a labor organization. Here, as elsewhere, we should apply the principle that, when it is necessary to restrict the freedom of labor or capital to enter any industry, the matter becomes the subject of public concern and public regulation. If membership in a labor organization is to be a condition precedent to the right of securing employment, it will be necessary for the government to control the constitution, policy, and management of such associations so far as may be requisite for the purpose in view. Only upon these terms would the compulsory unionization of industry be conceivable. Of course, before such legislation could be enacted, a change in the organic law of the states and the nation would need to be effected, for we now have numerous guarantees of the right of property in labor."

If our legislatures should enact statutes, such as have been advocated in Australia, purporting to give unionists a legal preference to employment, and such statutes should be upheld either under our present organic laws or under amendments of the Constitution, it would probably be found necessary to supplement them with a statute giving the state power to regulate admission to the unions. Such a supplemental statute might bring about a state of things like that now existing in New Zealand and New South Wales. The Industrial Arbitration Courts of those states are empowered to grant to unionists preference of employment. But "the court usually provides that

Lewis¹ that the principal danger of labor unions at the hands of the courts consists not in the fact that they are aiming toward monopoly, but rather in their methods of attempting to obtain control.

Assuming that a combination, in its intrinsic nature, is not necessarily unlawful, and assuming also that the obvious aiming at monopoly by labor combinations does not make them unlawful, still such combinations may use special methods which are unlawful. Two methods deserve particular consideration here: the expulsion of members and the imposition of fines.

Suppose that, in the agreement for forming the combination, the power of expelling members for disobedience is reserved to the majority; and suppose that thereafter a member is induced, by the threat of expulsion, to consent to some action prejudicial to a third person. Is this method of inducement unlawful as against the third person? We think not. If the members can lawfully form an organization which is to be governed by the will of the majority, then they can drop a member who refuses to abide by his agreement to obey.² But it does not follow that the combination can discipline a member if the particular action to which he refused to conform was not within the scope of the articles of association, or was intrinsically unlawful.³

Suppose that it is one of the articles of agreement that disobedient members may be heavily fined; and that thereafter the majority use the threat of imposing a heavy fine in order to induce

the union shall have preference only so long as it admits any [competent] applicant of good character to membership, without ballot or other formality likely to hamper his enrolment; upon payment of moderate fees fixed by the court. This is called enforcing the closed shop and open union." Clark, *Labour Movement in Australasia*, 174; Bulletin U. S. Bureau of Labor, January, 1905, 100; *In re The Wharf Labourers' Award*, 3 N. S. W. Industrial Arbitration Rep. 290; *Ex parte Conway*, 3 *ibid.* 362; *In re Young*, 4 *ibid.* 202.

¹ 42 Am. L. Reg. (N. S.) 160.

² A provision for expulsion was not deemed objectionable in *Macaulay v. Tierney*, 19 R. I. 255. See also 18 HARV. L. REV. 428, n. 3; *Lewis, Cas. on Restraint of Infringement*, etc., 269, n. 3; *Beechley v. Mulville*, 102 Ia. 602.

See *Gladish v. Bridgeford*, 113 Mo. App. 726, where a by-law was upheld which not only provided for the expulsion of a member guilty of misconduct, but also provided that no member should have any business dealings or relations with an expelled member.

Cf. Ertz v. Produce Exchange, 82 Minn. 173, where a somewhat similar provision, in connection with other provisions, was held a violation of Minn. Stat., c. 359, Gen. L. 1899.

³ *Schneider v. Local Union*, 40 So. Rep. 700 (La., 1905, 6).

a minority member to join in action damaging to a third person. Is this, as against the third person, an unlawful method of inducement?

It has been held unlawful in Vermont and Massachusetts,¹ and this result seems correct. The initial agreement of the member does not make the imposition of the fine a lawful method of coercion. ". . . when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation."²

Our next inquiry is, what constitutes a justification?

Professor A. V. Dicey has said:

"I have long been convinced . . . that the only way in which the law of Torts can be reduced to a rational and coherent system is to lay down that *prima facie* any damage done by X to A, in person, property, or character, is a tort, *but that there are a whole host of cases in which the doing damage is on various grounds justifiable, and therefore not a tort.*"³

In *Vegelahn v. Guntner*⁴ Judge Holmes said:

"It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."

Under this head of justification, in labor cases, the question which is most commonly raised relates to the so-called "right of competition." This term "competition" has been taken over from ordinary mercantile transactions.⁵ In labor cases it might be

¹ *Boutwell v. Marr*, 71 Vt. 1; *Martell v. White*, 185 Mass. 255. Cf. *In re Young*, 4 N. S. W. Industrial Arbitration Rep. 202.

² *Munson, J.*, in *Boutwell v. Marr*, 71 Vt. 1, 8.

³ The italics are ours.

⁴ 167 Mass. 92, 105, 106.

⁵ For criticism of this term as applied to labor disputes, see Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 358; and cf. *Holmes, J.*, in *Vegelahn v. Guntner*, 167 Mass. 92, 107.

more exact to speak of the defense of self-interest, or conflicts of temporal interest, or the legal limits of the "free struggle for life."¹ But, following the present legal phraseology and subject to the above explanation, we use the term "competition."

A defense grounded on the right of competition raises two main questions:

1. Who are competitors?
2. What are the legally allowable limits or methods of competition?

1. Who are competitors?

The defendant must be, in some reasonable sense, a business competitor of the plaintiff, as to the matter in question; *i. e.*, as to the matter in regard to which the defendant inflicts damage on the plaintiff. It is not enough that the defendant has an interest adverse to that of the plaintiff in some other pending matter; and *a fortiori* it is not enough that he has a grievance against the plaintiff in reference to some other past transaction. If A is sued by C for inducing C's employer to drop C, who is employed at will, A, if himself a candidate for C's position, may have the right of a business competitor. But if A induces the dropping of C from employment solely because C and he are having litigation over the title to real estate and he wishes to prevent C from earning sufficient money to carry on the law suit, A has not the rights of a business competitor.² A labor union cannot use its power to deprive one of employment, in order to compel him to pay a debt in which the union is interested.³ So merchants who wish to punish plaintiff hotel-keeper for his conduct as tax assessor are not justified in depriving him of hotel custom by threatening not to buy goods of any commercial traveller who stays at the plaintiff's hotel.⁴

It is now coming to be acknowledged that in a controversy

¹ We are here considering only conflicts of temporal interests, where the motives of both parties are selfish. Interesting questions may arise as to the justification of philanthropists who, out of concern for the welfare or morals of others, take action damaging to a business which they deem harmful to the community, but which is not carried on in violation of law. See Lord Herschell, in *Allen v. Flood*, [1898] A. C. 1, 9; also 43 Am. L. Reg. (N. S.) 103-104. And *cf.* 42 Am. L. Reg. (N. S.) 158, n. 82.

² The principle of this illustration was applied to a different set of facts in *London, etc., Co. v. Horn*, 206 Ill. 493.

³ *Giblan v. Nat'l, etc., Union*, [1903] 2 K. B. 600.

⁴ *Webb v. Drake*, 52 La. Ann. 290.

between employers and workmen in respect to wages, hours, etc., both parties have the rights of business competitors in the broad sense. There is a conflict of temporal interests between buyers and sellers of labor; in general, "whatever one party gains the other loses."¹

2. What are the legally allowable limits or methods of competition?

Excluding as clearly unlawful such methods as defamation, fraud, force, and inducement to break contracts, the question is, what are the limits of right conduct by persons engaged in economic contests? Or, more narrowly, what are the limits of legal conduct in labor disputes?

It is proposed to consider here only one group of cases, the most common and the most important; namely, where the defendant justifies on the ground that he has only been making a lawful use of his personal right to work or not to work. It is assumed, for reasons already stated, that these rights are not absolute; not so fully privileged as to make it unnecessary to show a special justification for damage intentionally inflicted by their use.

A defendant may claim that he is justified in objecting to being associated with certain workmen; or that he is justified in objecting to the source from which the employer obtains material to be worked upon, or to the disposition which the employer makes of the products of his labor. He may object to being associated with other workmen on account of their bad character, their race, their religion, their politics, their non-unionism; or it may be from his dislike to them for no reason that he can specify, any more than in the traditional instance of "Dr. Fell." But the question is not whether the defendant can be compelled to work with associates whom he dislikes, nor whether he can be sued for simply abstaining from working in their company. The case stated at the beginning of this article is one where a defendant intentionally induces a third person to refrain from entering into business relations with the plaintiff. In such a case the defendant is doing a great deal more than exercising his own right not to work. He is using that right as a lever to induce another person to exercise *his* right in a manner damaging to the plaintiff. Or, rather, the defendant is threatening to exercise his own right unless another

¹ Sir Godfrey Lushington's Report, annexed to Report of Royal Commission, p. 90. See also Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 937-938.

person takes action damaging to the plaintiff; or, more exactly still, he is offering to refrain from exercising his own right on condition that another person will take action damaging to the plaintiff.

Does such conduct on the defendant's part exceed the proper limits of liberty, or self-defense, or economic competition?

This presents a difficult problem, but of a kind not new to the law.

If the right or interest of the defendant is to be considered by itself, as if entirely independent of any relation to other persons and without regard to the harm which the exercise of his right may cause to others, he may have a strong case. And so, conversely; may the plaintiff. In some decisions judges seem to look only at the interest of one side, and virtually ignore that of the other side.¹ But the defendant's right, the legal limit of his conduct, is not to be determined solely in view of his own interest and convenience, but in view also of the interest and convenience of others. "Neither the Mogul Case nor any other says that the promotion of one's own interest will justify any and every means by which that end can be accomplished, and the utmost that can be said about self-interest as a justification for doing mischief to others is that it is one of the circumstances to be taken into consideration in determining whether there is or is not just excuse for the wilful infliction of loss upon others."²

How can the defendant's liberty be curtailed without depriving it of the greater part of its value? On the other hand, how can the defendant's liberty be left wholly unrestricted without rendering nugatory the correlative right of the plaintiff, or seriously impairing the interests of the general public?

"We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law . . ."³

Every person has a right under the law, as between him and his fellow citizens, to reasonably full freedom in disposing of his own labor or his own capital according to his own will, so far as the exercise of this right can be made compatible with the exercise of similar rights by others.⁴

¹ See 18 HARV. L. REV. 448.

² Wills, J., in *Allen v. Flood*, [1898] A. C. 1, 48. See also *Carpenter, J.*, in *Rindge v. Sargent*, 64 N. H. 294.

³ *Bowen, L. J.*, in *Mogul, etc., Co. v. McGregor*, 23 Q. B. D. 598, 611.

⁴ *Cf. Erle, Trade Unions*, 12.

"The legal right of a man to work is not absolute, but is based upon, and conditioned by, the welfare of society."¹

"The welfare of society is even more important than the welfare of organized workmen, and the welfare of each is bound up in the welfare of the other."²

"These are exercises of personal freedom which are perfectly legitimate in themselves, but which cannot be indulged in without interfering with rival exercises of personal freedom by others. One must give way to the other, and questions immediately arise as to which is to prevail, and whether the diminution of either by the exercise of the rival freedom gives rise to a right of action."³

It has been said that the principal business of the common law is the adjustment of conflicting rights.

Mr. Dicey has told us that the law of self-defense is a compromise.⁴

The same high authority has said:

" . . . the most which can be achieved by way of bringing into harmony two essentially conflicting rights [the learned author is here speaking of the right to individual freedom and the right of association] . . . is to effect a rough compromise between them. Such a practical solution of a theoretically insoluble problem is sometimes possible. That this is so is proved by our existing law of libel. It is a rough compromise between the right of A to say or write what he chooses, and the right of X not to be injured in property or character by A's free utterance of his opinions."⁵

We think that these views apply to the class of cases now under discussion. Decisions upon the sufficiency of alleged justifications must be the result of a compromise, and a rough compromise at that. And the distinctions between cases in which opposite results are reached must very often be differences of degree. " . . . in many cases the test of whether that which in itself and so far as its mere nature goes is not unlawful constitutes a cause of action or not is degree."⁶

¹ Mitchell, *Organized Labor*, 278.

² *Ibid.*, 423.

³ Wills, J., in *Allen v. Flood*, [1898] A. C. 1, 46.

⁴ Dicey, *The Constitution*, 6 ed., 437.

The law of negligence "is in its very nature a compromise." Prof. Bohlen, 40 *Am. L. Reg. (N. S.)* 83.

⁵ Dicey, *Law and Opinion in England*, Appendix 466.

⁶ Wills, J., *ubi supra*, 46.

What, in a general way, are the requisites of justification? ¹

Of course, the mere fact that a business competitor has intentionally done acts which he knew would seriously damage the plaintiff does not necessarily establish his liability. ² Nor, on the other hand, does the fact that such acts were very beneficial to the defendant necessarily exonerate him.

It is submitted that there can be no justification unless the following general requisites are complied with:

1. There must be a conflict of interest between plaintiff and defendant as to the subject matter in regard to which the damage is done. Or, at least, there must be a legitimate interest of defendant to be directly served as to that subject matter.

2. The damaging act must be reasonably calculated to substantially advance the interest of the defendant. ³

3. The damage resulting to the plaintiff, or to the general public (including the employer), must not be excessive in proportion to the benefit to the defendant. In other words, there must be a reasonable proportion between the benefit to the defendant and the damage to the plaintiff or to the public. ⁴

4. Even where propositions 1, 2, and 3 are made out, the justification must be confined to those cases where defendant uses only his own con-

¹ In *Giblan v. Nat'l, etc., Union*, [1903] 2 K. B. 600, 618, *Romer, L. J.*, said that "it is not practically feasible to give an exhaustive definition of the word [justification] to cover all cases." Cf. *Hammond, J.*, in *Martell v. White*, 185 Mass. 255, 258.

² "But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of them." *Loring, J.*, in *Pickett v. Walsh*, 78 N. E. Rep. 753 (Mass., 1906).

³ "... even a substantial and lawful end may not warrant the use of the particular means not adapted to the accomplishment of that end." 18 HARV. L. REV. 442.

In *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912, 935-936, *Caldwell, J.*, said: "The grounds of the boycott are wholly immaterial in determining the right to boycott. Whether organized labor has just grounds to declare a strike or boycott, is not a judicial question." We submit that, however correct these views may be as applied to the case then before the court, and using the word "boycott" in the sense intended by the learned judge, yet they cannot be affirmed as abstract general propositions of universal application.

It has been suggested that legal excuse "should not be found in the interest or advancement of the defendant," but "should be found, if at all, in the interest of the community at large." No doubt the interest of the defendant is not the only consideration. The interest of the community is also to be regarded. But the interest of the defendant is certainly one of the circumstances to be taken into consideration.

⁴ "... an unjustifiable end, that is, an end which intentionally inflicts a damage upon a particular individual without a corresponding and compensating advantage to the one who inflicts it or to those whom he represents." 18 HARV. L. REV. 439.

duct as a lever, and therewith operates directly upon the possible employer or customer of the plaintiff. Defendant can never justify using his right to work or not to work (or any other right) as a temporal inducement to influence an outsider, or fourth person,¹ to exert pressure upon the possible employer or customer of the plaintiff.

Jeremiah Smith.

[*To be continued.*]

¹ See previous explanation of these terms, *ante*, p. 265.